STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEDRICK STEVENSON,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 225994
Wayne Circuit Court
LC No. 99-005371

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of receiving and concealing stolen property worth between $1,000 and $20,000, MCL 750.535(3)(a), and resisting and obstructing a police officer, MCL 750.479. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to a term of three to ten years' imprisonment for the receiving and concealing conviction, as well as a term of ninety days to two years' imprisonment for the resisting and obstructing conviction. We affirm.

On appeal, defendant first contends that the prosecution failed to present sufficient evidence to support his conviction. We disagree. We review a challenge to the sufficiency of the evidence by determining whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that the prosecution proved the essential elements of the offense beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

To convict a defendant of receiving stolen property worth between $1,000 and $20,000, the prosecution must prove the following elements: (1) the property was stolen, (2) the value of the property was at least $1,000, (3) the defendant received, possessed or concealed the property, (4) the identity of the property as that which had been previously stolen, and (5) the defendant had constructive or actual knowledge that the property had been stolen. MCL 750.535(3)(a); *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996); *People v Toodle*, 155 Mich App 539, 550-551; 400 NW2d 670 (1986). The prosecution must prove every element of the offense by direct or circumstantial evidence, beyond a reasonable doubt. *Id*. at 551.

Defendant asserts that the prosecution failed to establish that the value of the stolen property was at least $1,000. We disagree. The value of stolen property is the market value at the time the defendant received or possessed the property. *Id*. at 553. Proof of value is

determined by reference to the time and place of the offense. *People v Dyer*, 157 Mich App 606, 609; 403 NW2d 84 (1986), citing *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984). The pictures of the vehicle in question provided the jury with a visual representation of its value at the time of defendant's possession. Further, the insurance proceeds received by complainant for the loss of her vehicle, amounting to $1,700, presented the jury with an independent estimate of the vehicle's value before it was stolen.[1] Based on this evidence, a rational trier of fact, applying his judgment to the evidence, could reasonably infer that the market value of the vehicle was at least $1,000 at the time defendant received or possessed it. *Toodle, supra* at 553. Thus, we find sufficient evidence of the vehicle's value to support defendant's conviction.

Defendant next contends that the trial court's admission of the preliminary examination testimony of a prosecution witness violated his constitutional right to confront witnesses. However, defendant waived this issue for appellate review because defense counsel expressly requested admission of the witness' preliminary examination testimony. Where a defendant intentionally relinquishes or abandons an issue, any error is extinguished and appellate review is waived. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Defendant next contends that several of the trial judge's comments deprived him of a fair and impartial trial. We disagree. Because defendant failed to object to any of the complained-of comments, appellate review is precluded absent a showing of plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error warrants reversal only where the error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*.

A defendant is entitled to a "neutral and detached magistrate." *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). While the trial court has wide discretion over matters of trial conduct, that discretion is limited to conduct which does not pierce the veil of judicial impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id*., citing *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

Defendant argues that the trial judge made improper comments during voir dire, improperly interrupted defense counsel's cross-examination of witnesses, and berated defense counsel in front of the jury. We must review the trial court's comments in their entire context to determine if they were likely to unduly influence the jury. *Paquette, supra* at 340; *Collier, supra* at 698. After careful review of the several comments at issue, we conclude that the trial court's conduct did not "pierce the veil of impartiality." The comments were not likely to unduly

[1] Defendant contends that evidence of the insurance proceeds was unobjected to hearsay, and thus, could not be used to prove the value of the vehicle. However, hearsay evidence admitted without objection "may be considered and given probative effect as though it were in law competent evidence." *People v Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976). Hearsay evidence admitted without objection is also entitled to consideration by an appellate court in support of the findings in a criminal case. *Id*.

influence the jury to the detriment of defendant. Thus, defendant has failed to show plain error that affected his substantial rights. *Carines, supra* at 763.

Further, we find that the trial judge's comments to defense counsel did not amount to the belittlement or berating of defense counsel in front of the jury. "A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court." *People v Ross,* 181 Mich App 89, 91; 449 NW2d 107 (1989). Trial judges who "berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of the impartiality necessary for a fair hearing." *Id*. at 91. In the instant case, defendant complains that the trial judge engaged in such conduct when he commented on defense counsel's late arrival in court and his nervous habit of clicking his pen. The trial judge's responses to those actions were reasonable and did not display a showing of partiality. Mere expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, do not establish partiality. *Cain v Dep't of Corrections,* 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Defendant next contends that the prosecution's use of a peremptory challenge to remove an African-American from the jury venire denied him of his constitutional right to an impartial jury, in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. We review a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *People v Howard,* 226 Mich App 528, 534; 575 NW2d 16 (1997).

The use of a peremptory challenge to strike a potential juror solely because of the potential juror's race violates the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV. *Batson, supra*; *People v Barker,* 179 Mich App 702, 705; 446 NW2d 549 (1989). To establish a prima facie case of discriminatory dismissal based on race, the defendant must show that: (1) the defendant belonged to a recognized racial group, (2) the prosecutor exercised a peremptory challenge to excuse a prospective juror of the defendant's race, and (3) the facts and other relevant circumstances raise an inference that the prosecutor used the peremptory challenge in an effort to exclude the juror based on race. *Batson, supra* at 97; *Barker, supra* at 705. Once the defendant makes a prima facie showing of purposeful discrimination, the prosecutor must offer a racially neutral explanation for using a peremptory challenge to exclude the juror from the venire. *Batson, supra* at 97; *Howard, supra* at 534.

Here, defendant failed to establish a prima facie case of purposeful discrimination. There was no evidence of a "pattern" of peremptory challenges to African-American venire persons. Further, the prosecution's questions and statements did not raise an inference that the prosecutor used peremptory strikes to exclude African-Americans from the jury venire. *Batson, supra* at 97; *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Although defendant is African-American and the prosecutor exercised a peremptory challenge to remove an African-American from the jury venire, the "race of a challenged juror alone is not enough to make out a prima facie case of discrimination." *Batson, supra* at 97. The "mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination." *Williams, supra* at 137. Moreover, the fact that the prosecutor did not try to remove all African-Americans from the jury venire is strong evidence against a showing of discrimination. *Howard, supra* at 536 n 3; *Williams, supra* at 137. Because defendant failed to make a prima facie showing of purposeful discrimination, the prosecutor was not required to provide a neutral explanation for exercising the peremptory

challenge. *Id*. Thus, the trial court did not abuse its discretion in denying defendant's *Batson* challenge.

Finally, defendant contends that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to challenge the racial composition of his jury venire. We disagree. Because defendant did not move for a new trial or seek an evidentiary hearing, our review is limited to mistakes apparent on the existing record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

A criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community. US Const, Am VI; *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). However, a defendant is not entitled to a jury that exactly mirrors the community and reflects the various distinctive groups in the population. *Id*. Instead, the Sixth Amendment guarantees an opportunity for a representative jury by requiring that the jury pool from which juries are drawn must not systematically exclude distinctive groups in the community. *Id*. at 472-473. To establish a prima facie violation of the fair cross section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Howard, supra* at 533, quoting *Hubbard, supra* at 473.]

Although defendant satisfied the first prong of the this analysis, his claim must fail because he cannot satisfy either the second or third prongs. The second prong of this test is satisfied by showing that a distinctive group was substantially underrepresented in the jury pool. *Hubbard, supra* at 473. However, there is nothing in the record concerning the representation of jury venires in Wayne County in general. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Howard, supra,* at 533.[2]

Showing that the underrepresentation of a distinctive group is due to systematic exclusion satisfies the third prong of the above test. *Hubbard, supra* at 481. Systematic exclusion is "an exclusion resulting from some circumstance inherent in the particular jury process used." *Id*. at 481; *Howard, supra* at 533. It is well settled that one incidence of a jury venire being disproportionate is not evidence of a systematic exclusion. *Howard, supra* at 534; *Hubbard, supra* at 481. Rather, a systematic exclusion must be of significant duration. *Id*. The evidentiary record neither discusses the juror selection process employed by Wayne County, nor did defendant provide any evidence concerning the process. Because defendant has produced no

[2] Defendant contends in his brief that African-Americans account for over forty percent of the population within Wayne County, while his jury venire consisted of less than forty percent African-Americans. However, because this information is not part of the existing evidentiary record, we cannot consider it.

evidence establishing that the jury selection process systematically excluded African-Americans, he has failed to show that the selection process was not reasonably representative of the community in which the jury was drawn. Defendant failed to demonstrate a prima facie case of a violation of the fair cross-section requirement.

Because defendant failed to show that he was denied a fair trial, defense counsel's failure to challenge the jury venire did not amount to an ineffective assistance of counsel. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant failed to establish a reasonable probability that, but for defense counsel's failure to challenge the jury venire, the outcome of the trial would have been different. *Id*. at 312-313. Thus, we are precluded from review of this issue because defendant failed to show a plain error that affected his substantial rights. *Carines, supra* at 763.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder